



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 177 OF 2017

GOLD LIDA LIMITEDPLAINTIFF/APPLICANT

=VERSUS=

NIC BANK LIMITED1ST RESPONDENT

JOSEPH M. GIKONYO T/A

GARAM INVESTMENTS AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

R U L I N G

Introduction:

1. This Ruling relates to a Notice of Motion dated 16/3/2017 brought by the Plaintiff seeking an injunction restraining the Respondents/Defendants against selling Land Reference No.15099, Title No. IR 72132. It is supported by the Affidavit of Da Li sworn on 16/3/2017.
2. The Application is opposed by the Respondents. The 1st Respondent's Legal Manager, Kelvin Mbaabu, swore a Replying Affidavit setting out the grounds of opposition.

Background

3. Through a series of charge instruments, the Chargor charged the suit property to secure loan facilities advanced to M/s Foton East Africa by the 1st Defendant. The Principal Debtor defaulted and the 1st Respondent has advertised a sale of the suit property scheduled to take place today at 11:00 am.
4. The only reason why the Applicant seeks to stop the sale is that the intended sale is in breach of Section 97 (1) (2) and (3) of the Land Act, No. 6 of 2012 which provides as follows.

“97 1. A chargee who exercises a power to sell the charged land, including the excise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.

2. A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.

3. If the price at which the charged land is sold is twenty-five per centum or below the market

value at which comparable interests in land of the same character and quality are being sold in the open market:

(a) there shall be a rebuttable presumption that the chargee is in breach of the duty imposed by subsection (1); and

(b) the chargor whose charged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a plot of charged land is sold by the chargee at an undervalue being less than twenty-five per centum below the market value shall not be taken to mean that the chargee has complied with the duty imposed by subsection (1).

4. It shall not be a defence to proceedings against a chargee for breach of the duty imposed by subsection (1) that the chargee was acting as agent of or under a power of attorney from the chargor or any former chargor.

5. A chargee shall not be entitled to any compensation or indemnity from the chargor, any former chargor or any guarantor in respect of any liability arising from a breach of the duty imposed by subsection (1).

6. The sale by a prescribed chargee of any community land occupied by a person shall conform to the law relating to community land save that such a sale shall not require any approval from a Community Land Committee.

7. Any attempt by a chargee to exclude all or any of the provisions of this section in any charge instrument or any agreement collateral to a charge or in any other way shall be void.

5. This suit and the material Application were triggered by the Notice of Sale placed in the Daily Nation Newspaper on 6/3/17. I should observe that the statutory Notices of Sale attached to the respective Affidavits in this Matter are in respect of a sale which was to be conducted on 06/12/2016 at the offices of M/s Garam Investments.

6. Mr. Okoth, Counsel for the Applicant submitted that under Section 97 of the Land Act, the 1st Defendant owes the Plaintiff a duty of care and is obligated to obtain a forced sale valuation of the suit property. He submitted that in a valuation undertaken by the Bank's Valuers, M/s Mwaka Musau Consultants in September 2014, the Bank's Valuers valued the suit property at Kshs.1.3 Billion. He argued that the intended sale of the property at Kshs.680,000,000 would be a rip-off and a blatant breach of the duty of care contemplated in Section 97 of the Land Act.

7. On his part, Mr. Kabaiku, counsel for the Respondent submitted that there have been a series of valuations putting the value of the suit property at Kshs.550,000,000 (February 2013), Kshs.1.3 Billion (September 2014), Kshs.650,000,000 (September 2015) and Kshs.680,000,000 (September 2016). He submitted that the value of Kshs.1.3 Billion which is contained in the Report by M/S Mwaka Musau Consultants dated September 2014 is inconsistent with the other three valuation reports.

Determination

8. The Application was argued in open court and I have had hardly 30 minutes to consider the Application and come up with a determination.

9. The issue for determination is whether the Applicant has satisfied the criteria for grant of an interlocutory injunction. This criteria was laid down in **Giella vs. Cassman Brown & Co. Ltd (1973) E. A 358**. The Plaintiff must establish that he has a prima facie case with a probability of success; that he will suffer irreparable injury that cannot be compensated by an award of damages if the injunction is not granted and; if the court is in doubt, the application is to be determined on a balance of convenience.

10. A prima facie case was defined in the case of **Mrao Limited vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125** as follows:-

“In civil cases, a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

11. In the case of **Nguruman Limited vs. Jan Bonde Nielsen & 2 others(2014)eKLR**, the court stated that:-

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities.”

12. The legal framework contained in Section 97 of the Land Act is relatively new in our land laws. Courts are enjoined to prevent breach of the law, particularly where there is an express provision imposing a mandatory statutory duty on a party, such as Section 97 of the Land Act. It is clear that, there is conflicting evidence as to the true market value of the suit property. To ascertain the true value of the suit property would require a valuation within the framework of Section 97 of the Land Act.

13. I have considered the mandatory legal requirements contained in Section 97 of the Land Act. I have also taken into account the conflicting valuation reports by two firms of valuers appointed by the 1st Defendant, I have also taken into account the fact that there is no doubt that the Principal Debtor has defaulted to service the loan.

14. Besides, also considered the unique circumstances of this case, and the law and guiding principles on interlocutory injunction.

15. The Court of Appeal in the case of **National Bank of Kenya Vs Shimmers Plaza Limited (2009) eKLR** observed that an injunction is an equitable and discretionary remedy, that the duration of an injunction is at the sole discretion of the trial judge and depends on the circumstances of each case. Guided by this principle, I make the following orders:-

(i) The intended auction of Land Reference Number 15099 Title No. IR 72132 by the Defendants is suspended for a period of 45 days from today.

(ii) The Plaintiff shall within the said period of 45 days deposit into the Loan Account United States Dollars 4,395,964.62, Kshs.6,469,183.72 and all subsequently accruing interest.

(iii) In default of payment of the said sums, the 1st Defendant shall be at liberty to undertake a valuation of the suit property within the framework of Section 97 of the Land Act and proceed to realize the security in tandem with the terms of the charge instruments. The valuation shall be done by a registered valuer other than M/S Mwaka Musau Consultants and Landmark Realtors Limited.

(iv) Costs shall be in the cause.

(v) This Matter shall be mentioned on 24/5/2017 with a view to giving further directions taking into account that the only dispute before court is about the value of the suit property and Section 97 of the Land Act gives the chargee the mandate to undertake a valuation of the charged property.

Dated, signed and delivered at Nairobi on ...21stday of March 2017.

.....

B M EBOSO

JUDGE

In the presence of:-

.....Advocate for the Plaintiffs

.....Advocate for the Defendants

.....Court clerk